STATE OF MICHIGAN

COURT OF APPEALS

MARCO VALENTE, JR.,

Plaintiff-Appellant,

v

GEORGE BUTTS, GERALDINE BUTTS, and MARIA B. VALENTE,

Defendants-Appellees,

and

GEORGE NUCLOVIC and MARIA NUCLOVIC,

Intervening Plaintiffs.

UNPUBLISHED
May 4, 2004

No. 246395
Macomb Circuit Court
LC No. 00-003731-CH

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order setting a $150 monthly fee for use of a septic tank and tile field located on plaintiff's property and utilized by an adjacent parcel. Plaintiff maintains that there was no testimony or documentary evidence supporting a $150 fee, and that the ruling was contrary to an express agreement. This case is submitted without oral argument pursuant to MCR 7.214(E). We affirm.

Plaintiff filed a complaint for partition and sale of a parcel of real property and requested the appointment of a receiver. Plaintiff and his former wife, defendant Maria Valente, owned an undivided one-half interest in the property as tenants-in-common, and defendants George and Geraldine Butts owned the remaining undivided one-half interest as tenants by the entireties. A restaurant is located on the property and is operated by George and Maria Nuclovic who leased the restaurant-property from plaintiff and defendants through a partnership created by plaintiff and defendants set up for the purpose of leasing the property. Plaintiff also owns an adjacent property to the north that contains a septic tank and tile field which is utilized by the restaurant property for waste disposal.

Pursuant to a divorce judgment, plaintiff and his ex-wife were to sell their interest in the restaurant property through a court-appointed receiver with the proceeds being divided between the two. Plaintiff alleged, however, that their undivided one-half interest could not be sold separately, nor was physical partition viable; therefore, his partition complaint sought a sale of

all interests in the entire parcel, including the Butts' interests. The parties eventually agreed to sell all of their interests, and the trial court appointed a receiver to carry out a transaction.[1] The Nuclovics offered to purchase the property for $235,000, and the court authorized the receiver to accept the purchase offer. Subsequently, the trial court entered an order authorizing the receiver to convey the property to the Nuclovics. An addendum to the purchase agreement, signed by the Nuclovics, provided:

> Purchasers acknowledge that upon consummation of the sale, they will no longer be able to park any vehicles on the northerly adjacent property without the permission of the owners of the northerly adjacent property [plaintiff], that they will have to remove any trash dumpsters from the adjacent property *and they can no longer use the septic tank and tile field located on such adjacent property without having to reach an agreement with the adjacent property owner as to a fee to be charged for such use.*
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> These provisions are merely a recital of the understanding of the parties and the sale is not conditioned or contingent on the above. [Emphasis added.]

On the eve of the closing, plaintiff contacted the Nuclovics' lending institution and informed it that he would not allow the Nuclovics to use the septic tank and tile field on plaintiff's adjacent property; a closing did not occur. In multiple motions and emergency motions filed by defendants and the Nuclovics, who were permitted to intervene in the action, it was asserted that a 1974 agreement (Agreement to Permit Installation of Tile Field) signed by the Valentes provided that the subject septic tank and tile field was to accommodate the restaurant property's waste disposal system until a public sewer became available, thereby creating an appurtenant easement that ran with the land. Defendants and the Nuclovics sought a court order mandating that a closing on the sale of the property take place pursuant to the purchase agreement. It appears that the Valentes executed the tile field agreement in 1974 in order to obtain the necessary permits to construct the restaurant. The agreement provides, in relevant part:

> The undersigned hereby agree that they will permit the installation and maintenance of a tile field of necessary size to service the aforesaid waste disposal system for [the restaurant property] on their land . . . .
>
> The undersigned further agree that the tile field herein provided may be maintained and continued until such time as public sewer is available to the [restaurant property], and only until such time.

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[1] Initially, defendants filed a motion for summary disposition on the ground that the 1974 partnership agreement between the parties required arbitration of the matter. The trial court denied the motion, ruling that the partnership agreement, which was set up solely for the purpose of leasing the restaurant on the property, did not govern matters concerning the ownership and sale of the real estate, where the partnership did not have an ownership interest in the property. This issue is not presented on appeal.

The trial court held multiple hearings and ruled, in pertinent part, that the 1974 agreement granted an easement to accommodate the installation and maintenance of a septic tank and tile field that would service the waste disposal needs of the restaurant property until a public sewer was made available. The trial court found that the agreement created an appurtenant easement that ran with the restaurant property. The court also ruled that the new owners of the restaurant property (Nuclovics) were to pay plaintiff a monthly fee of $150 in order to use the septic tank and tile field easement. The trial court enjoined plaintiff from interfering with the use of the easement, and it ordered that a closing take place. It appears that a closing occurred on July 29, 2002.

Plaintiff filed a motion for reconsideration, arguing that the trial court erred in concluding that an appurtenant easement existed and erred in setting a $150 monthly fee for use of the easement. Plaintiff maintained that there was no documentary evidence supporting the ruling, and he stressed the language of the purchase agreement addendum, asserting that there had been no agreement with the Nuclovics regarding the use or cost of the septic tank and tile field. The trial court issued a written ruling, which provided, in pertinent part:

> Plaintiff avers this Court created the easement appurtenant, and asks for reconsideration of that decision. Plaintiff further avers the Court set a fee of $150 for the easement's use, and plaintiff contends the use was not bargained for as required in the contract for purchase as mandated in the Addendum to Offer to Purchase Real Estate. Plaintiff further contends he never intended to give an easement to anyone and that no testimony was entered into the record to determine the value of the easement created or the reasonable cost for its use. . . .
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> * * *
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> First, plaintiff does not dispute that he and his wife entered into the July 15, 1974, Tile Field Agreement, which expressly provided that the owners . . . would permit the installation and maintenance of a tile field of necessary size to service the waste disposal system for . . . the property pertinent to this case. Further, the Tile Field Agreement provides that the easement is to continue until such time as a public sewer became available to the property . . ., and no public sewer is available as of yet. Thus, the Court recognized that plaintiff and his wife had created this easement and it runs with the land. Second, although plaintiff asserts that the use of the easement granted was not bargained for, and that no testimony was entered into the record to determine the value of the easement, plaintiff does not dispute intervening plaintiffs' [Nuclovics] pleading that at closing the parties had an oral agreement of $150 per month for the use of the easement. The Court thus remains persuaded that the portion of the "Addendum to Offer to Purchase Real Estate" which reads "[purchasers] can no longer use the septic tank and tile field located on such adjacent property without having to reach an agreement with the adjacent property owner as to a fee to be charged for such use" has been satisfied. The Court does not agree another hearing needs to be held. The Court remains persuaded plaintiff raises in this motion the same issues raised and considered previously.

Following the closing and an initial dispute between the parties concerning the manner of distribution, during which time the sale proceeds were placed in escrow, the proceeds were distributed to plaintiff and defendants pursuant to settlement agreements reached by those parties.

On appeal, plaintiff argues that there was no evidence to support the trial court's order setting the monthly fee at $150 for the Nuclovics' use of the easement, and that the order was contrary to the express terms of the purchase agreement addendum providing that the monthly fee would be negotiated. Plaintiff does not argue that the trial court erred in finding that the 1974 tile field agreement created an appurtenant easement; the sole appellate focus is on the amount the Nuclovics are required to pay to use the easement. Plaintiff requests that this Court vacate the trial court's order and remand the case "for either an evidentiary hearing or a trial to determine a fair and just fee for usage of the septic field on plaintiff's property."[2] Plaintiff maintains that a reasonable fee would be higher than $150, where plaintiff no longer had an ownership-landlord interest in the restaurant property, which had given him a reason, attracting tenants, to keep the fee low.

An action seeking partition and sale of land is equitable in nature. MCL 600.3301. This Court reviews equitable determinations de novo. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). But, a trial court's factual findings made in support of the equitable determination are reviewed for clear error. *Id.*; MCR 2.613(C).

An appurtenant easement, which the trial court concluded exists here, attaches to land and is incapable of existence separate and apart from the particular land to which it is annexed. *Schadewald v Brule*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997). An appurtenant easment runs with the land. *Myers v Spencer*, 318 Mich 155, 163; 27 NW2d 672 (1947). The land served or benefited by an appurtenant easement is called the dominant tenement (restaurant property), and the burdened land is called the servient tenement (adjacent tile field property). *Schadewald, supra* at 36. Once an easement has been granted, it cannot be modified by either party unilaterally. *Id.*

Because plaintiff does not challenge the trial court's ruling that an appurtenant easement exists, our ruling examines only the $150 monthly fee set by the trial court. We refrain from rendering any opinion on whether an appurtenant easement exists. Our review of the record finds no documentary evidence supporting a fee in the amount of $150. A transcript of one of the motion hearings reveals that counsel for the Nuclovics told the trial court that the Nuclovics, as tenants, had been paying $150 per month to plaintiff to use the septic tank and tile field pursuant to a lease agreement. Apparently, the trial court used this information to determine the $150 fee amount. There is no actual lease contained in the record. Plaintiff's appellate brief, however, acknowledges that the Nuclovics were paying $150 per month to plaintiff to use the septic tank and tile field.

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[2] We have not received appellee briefs from defendants, nor the Nuclovics.

The terms of the lease agreement, in all likelihood, no longer had any bearing after sale of the property because the Nuclovics' tenancy ended, and considering the addendum to the purchase agreement indicating that a fee agreement had to be negotiated between the Nuclovics and the adjacent property owner (plaintiff), it is reasonable to conclude that the previous agreement to pay $150 was no longer controlling. Therefore, it would appear that documentary evidence needed to be presented or a trial/evidentiary hearing conducted in order to show a new agreement or to establish a reasonable fee if an agreement had not been reached.[3] Nonetheless, the trial court specifically ruled, on reconsideration, that an unchallenged pleading showed that at closing the parties reached an oral agreement of $150 per month for use of the easement, and thus the addendum language requiring an agreement had been satisfied. While we are uncertain of the soundness of this statement in light of the timeframe of events and pleadings and the claims of plaintiff's refusal to allow use of the septic tank and tile field, it indeed formed the basis of the trial court's ruling and order. On appeal, plaintiff fails to address or even mention this underlying basis cited by the trial court as supporting its ruling, let alone present a counter argument, e.g., that no such agreement was reached. Plaintiff does not otherwise explain or argue the incorrectness of the trial court's basis for its ruling; there is no claim that the finding that an oral agreement was reached to allow use of the easement for $150 was error. Although plaintiff argues in general that there was no supporting documentary evidence presented, where he makes no claim or assertion on appeal that there was no oral agreement as indicated by the trial court and fails to even address the issue, we find no obligation on our part to come up with analysis and reasoning to support a finding contrary to the trial court's. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

Plaintiff has effectively waived his argument and appellate review.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski

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[3] We note that the addendum language could be interpreted as positing that absent an agreement, no use would be permitted. However, because the trial court found that the easement ran with the restaurant property, and because plaintiff does not challenge that ruling, nor make any claim that the Nuclovics should not be allowed to utilize the septic tank and tile field, we need not address the matter. Plaintiff's claim solely relates to placing a dollar amount on the use of the easement.